

United States  
9  
Circuit Court of Appeals  
For the Ninth Circuit.

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STERLING TIRE CORPORATION, a Corporation,  
Plaintiff in Error,  
vs.

JOHN M. SULLIVAN, as Receiver of an Alleged Copartner-  
ship Consisting of E. E. GERLINGER and G. R.  
HICKOK and Trading Under the Fictitious Name of  
STERLING TIRE COMPANY OF CALIFORNIA,  
and E. E. GERLINGER, Intervenor,  
Defendants in Error.

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Transcript of Record.

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Upon Writ of Error to the Southern Division of the  
United States District Court of the  
Northern District of California,  
Second Division.

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FILED  
NOV 10 1921  
F. D. MONTGOMERY  
CLERK



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**Circuit Court of Appeals**  
**For the Ninth Circuit.**

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# INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

	Page
Affidavit on Replevin.....	6
Answer to Complaint.....	12
Assignment of Errors.....	54
Bond on Writ of Error.....	56
Certificate of Clerk U. S. District Court to Transcript of Record on Writ of Error....	60
Citation on Writ of Error.....	64
Complaint for Replevin.....	1
Complaint in Intervention.....	18
Findings of Fact and Conclusions of Law (Bill of Exceptions).....	47
Judgment.....	28
Judgment on Findings (Bill of Exceptions)..	49
Marshal's Return to Requisition.....	8
Names and Addresses of Attorneys of Record..	1
Notice of Motion of Receiver for Direction and Compensation (Bill of Exceptions).....	38
Order Allowing Receiver's Compensation on Account (Bill of Exceptions).....	44
Order Allowing Writ of Error.....	56
Order Confirming Account of Receiver (Bill of Exceptions).....	45

Index.	Page
Order Directing Receiver in His Duties (Bill of Exceptions).....	40
Order Granting Leave to Intervene.....	17
Order Granting Permission to Sue Receiver (Bill of Exceptions).....	43
Order Settling Bill of Exceptions.....	52
Petition for Writ of Error.....	53
Plaintiff's Answer to Complaint in Intervention of E. E. Gerlinger.....	23
Plaintiff's Bill of Exceptions.....	30
Praeipie for Record on Writ of Error.....	58
Replevin Bond.....	10
Requisition to Take Property from Defendant.	6
Return to Writ of Error.....	63
Stipulation Re Bill of Exceptions.....	51
Stipulation Waiving Jury.....	27
Writ of Error.....	61

**Names and Addresses of Attorneys of Record.**

Messrs. McNAIR & STOKER, 1204 Merchants  
Exchange Bldg., San Francisco, Calif.,

Attorneys for Plaintiff.

EDGAR D. PEIXOTTO, Esq., Nevada Bank Bldg.,  
San Francisco, Calif.,

Attorney for Defendant.

ROY A. BRONSON, Esq., 68 Post St., San Fran-  
cisco, Calif.,

Attorney for Intervenor.

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In the Southern Division of the District Court of the  
United States, Northern District of California,  
Second Division.

STERLING TIRE CORPORATION,

Plaintiff,

vs.

JOHN M. SULLIVAN, as Receiver of an Alleged  
Copartnership Consisting of E. E. GERLIN-  
GER and G. R. HICKOK and Trading Un-  
der the Fictitious Name of STERLING  
TIRE COMPANY OF CALIFORNIA.

Defendant.

**Complaint for Replevin.**

Comes now the plaintiff above named and for  
cause of action against the defendant above named al-  
leges and says:

**I.**

That defendant is now and was at all of the times  
herein stated a corporation organized and existing

and doing business under and by virtue of the laws of the State of New Jersey, and was at all of said times and now is a citizen and resident of the United States and of said State of New Jersey.

## II.

That defendant is now and was at all of the times herein stated a citizen and resident of the United States and of the State of California.

## III.

That the defendant above named, John M. Sullivan, by order duly given and made on the 6th day of May, 1920, by the Superior Court of the State of California in and for the City and County of San Francisco, in an action therein pending in which one E. E. Gerlinger was and is the plaintiff, and one G. R. Hickok was and is the defendant, action No. 106,555, [1\*] was appointed Receiver of all of the assets and property of an alleged copartnership consisting of said E. E. Gerlinger and said G. R. Hickok, and trading under the fictitious name and style of Sterling Tire Company of California; and by said order said Receiver was authorized and directed to take possession of all of the assets and property of said alleged copartnership. That said John M. Sullivan qualified as such Receiver, and thereafter and on or about the 7th day of May, 1920, took possession of the property hereinafter described, being property owned by plaintiff above named and to the possession of which plaintiff was at said time, ever since has been, and is now, entitled.

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Page-number appearing at foot of page of original certified Transcript of Record.



IV.

That the matter in controversy herein exceeds, exclusive of interest and costs, the sum or value of \$50,000.

V.

That on or about the 7th day of May, 1920, plaintiff was and now is the owner and entitled to the possession of the following described personal property located in the City and County of San Francisco, State of California:

Cord Casings.		Tubes.		Fabric Casings.
4 40 x 8	8	28 x 3	—29 x 3½	5 35 x 5
4 38 x 7	55	30 x 3		8 33 x 5
30 36 x 6	298	30 3½—31 x 4		8 36 x 4½
21 37 x 5	30	33 x 4		16 35 x 4½
6 36 x 5	82	32 x 3½—33 x 4		9 34 x 4½
213 35 x 5	10	33 x 4½		10 33 x 4½
78 33 x 5	47	32 x 4 —33 x 4½		7 32 x 4½
37 36 x 4½	31	32 x 4½—33 x 5		44 34 x 4
81 35 x 4½	79	34 x 4½—35 x 5		22 33 x 4
83 34 x 4½	25	36 x 4½—37 x 5		36 32 x 4
72 33 x 4½	4	38 x 7		9 31 x 4
190 32 x 4½	4	40 x 8		99 32 x 3½
191 34 x 4	20	34 x 4 —35 x 4½		248 30 x 3½ Standard
199 33 x 4	30	36 x 6		215 30 x 3½ Trojan
242 32 x 4	—			290 30 x 3½ Super
100 32 x 3½	723			5 29 x 3½
46 30 x 3½				85 30 x 3
				6 28 x 3
1597				1122 [2]

That said personal property is of the value of \$100,000.

VII.

That said defendant, on or about the 7th day of

May, 1920, without plaintiff's consent, and wrongfully, took possession of said personal property, and still retains possession thereof, and claims to be entitled to the possession thereof as Receiver of the aforesaid alleged copartnership.

#### VIII.

That prior to the commencement of this action plaintiff demanded of defendant the possession of said personal property, and the whole thereof, but to deliver the possession thereof defendant refused and still refuses.

#### IX.

That defendant still unlawfully withholds and retains said personal property from the possession of plaintiff, to plaintiff's damage in the sum of \$100,000.

#### X.

That in the pursuit of the possession of said personal property, and in its efforts to regain the possession thereof, plaintiff has incurred liability and suffered damage in the sum of \$5,000.

#### XI.

That said property has not been taken for a tax, assessment, or fine, pursuant to a statute, or seized under an execution or an attachment against the property of plaintiff.

#### XII.

That prior to the commencement of this action plaintiff obtained permission from the Superior Court of the State of California in and for the City and County of San Francisco, in the aforesaid action of E. E. Gerlinger vs. G. R. Hickok, in which the above-named defendant was appointed Receiver, that

plaintiff herein could bring such action against said Receiver as it might be advised. [3]

WHEREFORE, plaintiff demands judgment against the defendant above named for the recovery of the possession of said personal property, or for the sum of \$100,000, the value thereof, in case a delivery cannot be had, together with \$5,000 damages, and for costs of suit, and for such further relief as may be equitable.

HOWARD HARRON,  
McNAIR & STOKER,  
Attorneys for Plaintiff.

State of California,  
City and County of San Francisco,—ss.

Geo. E. Stoker, being first duly sworn, deposes and says: That he is one of the attorneys for plaintiff in the above-entitled action, and that this affiant has his office in the City and County of San Francisco, State of California. That the plaintiff in said action, Sterling Tire Corporation, is a corporation organized and existing under the laws of the State of New Jersey, and plaintiff and each and all of the officers of plaintiff are absent from the said City and County of San Francisco, and are therefore unable to verify the foregoing complaint; and for that reason this verification is made by this affiant. That this affiant has read the foregoing complaint and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters which are therein stated on information or belief, and as to those matters that he believes it to be true.

GEO. E. STOKER.

Subscribed and sworn to before me this 10th day of June, 1920.

[Seal]

KATHRYN E. STONE,  
Notary Public. [4]

[Endorsed]: Filed Jun. 11, 1920. W. B. Maling,  
Clerk. By J. A. Schaertzer, Deputy Clerk. [5]

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(Title of Court and Cause.)

**Requisition to Take Property from Defendant.**

To the United States Marshal, Southern Division of  
the Northern District of California:

You are hereby required to take from the defendant above named the property described in the within affidavit.

Dated, June 10, 1920.

HOWARD HARRON,  
McNAIR & STOKER,  
Attorneys for Plaintiff. [6]

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(Title of Court and Cause.)

**Affidavit on Replevin.**

State of California,  
City and County of San Francisco,—ss.

Geo. E. Stoker, being duly sworn, says: That he is one of the attorneys for the plaintiff in the above-entitled action; that plaintiff is the owner of the property claimed in this action, which is described as follows:

Cord Casings.		Tubes.		Fabric Casings.	
4	40 x 8	8	28 x 3 — 29 x 3½	5	35 x 5
4	38 x 7	55	30 x 3	8	33 x 5
30	36 x 6	298	30 3½—31 x 4	8	36 x 4½
21	37 x 5	30	33 x 4	16	35 x 4½
6	36 x 5	82	32 x 3½—33 x 4	9	34 x 4½
213	35 x 5	10	33 x 4½	10	33 x 4½
78	33 x 5	47	32 x 4 — 33 x 4½	7	32 x 4½
37	36 x 4½	31	32 x 4½—33 x 5	44	34 x 4
81	35 x 4½	79	34 x 4½—35 x 5	22	33 x 4
83	34 x 4½	25	36 x 4½—37 x 5	36	32 x 4
72	33 x 4½	4	38 x 7	9	31 x 4
190	32 x 4½	4	40 x 8	99	32 x 3½
191	34 x 4	20	34 x 4 — 35 x 4½	248	30 x 3½ Standard
199	33 x 4	30	36 x 6	215	30 x 3½ Trojan
242	32 x 4	—		290	30 x 3½ Super
100	32 x 3½	723		5	29 x 3½
46	30 x 3½			85	30 x 3
				6	28 x 3
1597				1122	

That plaintiff is entitled to the immediate possession of all of the foregoing property.

That said property is now in the possession of, and wrongfully detained by, the defendant herein; that, according to the best knowledge, information and belief of this affiant the alleged cause of such detention of said property is that one E. E. Gerlinger claims the existence of a copartnership between himself and one G. R. Hickok, trading under the fictitious name and style of Sterling Tire Company of California, and that said alleged copartnership has some contract with the plaintiff [7] above named whereby said alleged copartnership is entitled to the possession of said property with the right to sell the same upon certain terms and conditions, and that said Gerlinger commenced an action in the

Superior Court of the State of California in and for the City and County of San Francisco for the dissolution of said alleged copartnership and for the appointment of a receiver to take possession of the assets of said alleged copartnership and to carry on the business thereof, and that said Superior Court, in said action, appointed said defendant as such Receiver for the purposes stated, and acting as such Receiver said defendant took possession and retains possession of said property; but plaintiff denies the existence of any contract between it and said alleged copartnership, or with any other person, whereby the ownership or possession, or right of possession, of the property described is in any manner involved.

That neither said property nor any part thereof has been taken for a tax, assessment or fine pursuant to a statute; or been seized under an execution or an attachment against the property of the plaintiff.

That the actual value of the property is \$100,000.

GEO. E. STOKER,

Subscribed and sworn to before me this 10th day of June, 1920.

[Seal]

KATHRYN E. STONE,

Notary Public. [8]

### **Marshal's Return.**

I hereby certify and return, that on the 16th day of June, 1920, I executed the order indorsed hereon, for delivery of the personal property mentioned in the within affidavit, by taking possession all of such property to be found within my district, to wit:



Cord Casings.		Tubes.		Fabric Casings.
4 40 x 8	8	28 x 3 — 29 x 3½	3	35 x 5
4 38 x 7	55	30 x 3	9	33 x 5
30 36 x 6	299	30 x 3	7	36 x 4½
212 37 x 5	29	33 x 4	16	35 x 4½
4 36 x 5	81	32 x 3½ — 33 x 4	9	34 x 4½
211 35 x 5	11	33 x 4½	10	33 x 4½
74 33 x 5	47	32 x 4 — 33 x 4½	8	32 x 4½
38 36 x 4½	31	32 x 4½ — 33 x 5	44	34 x 4
81 35 x 4½	78	34 x 4½ — 35 x 5	24	33 x 4
81 34 x 4½	25	36 x 4½ — 37 x 5	38	32 x 4
70 33 x 4½	4	38 x 7	9	31 x 4
188 32 x 4½	4	40 x 8	99	32 x 3½
186 34 x 4	18	34 x 4 — 35 x 4½	216	30 x 3½) Standard
197 33 x 4	30	36 x 6	244	30 x 3½) Trojan
240 32 x 4			292	30 x 3½) Super
100 32 x 3½			6	29 x 3½
43 30 x 3½			85	30 x 3
			6	28 x 3
1572	720		1125	

Old tires.—2 34 x 4 and 1 30 x 3½  
and at the same time I delivered to John Feeny, Deputy Receiver (acting for the defendant John M. Sullivan, Receiver of an alleged copartnership consisting of E. E. Gerlinger and G. R. Hickok and trading under the fictitious name of Sterling Tire Company of California), a copy of the within affidavit and order, and undertaking duly approved by me, and defendant having failed to except to the surety therein, and also having omitted to require a return of said property, and no other person than the defendant having made claim thereto, I did at the expiration of the time prescribed by the statute for seeking such delivery and making such claim, to wit, on the 25th day of June, 1920, deliver the property so

taken to the plaintiff, as by said order I am commanded.

J. B. HOLOHAN,  
U. S. Marshal.  
By G. White,  
Deputy. [9]

[Endorsed]: United States Marshal's Office. San Francisco, California. Received Jun. 11, 1920, 12 M. J. B. Holohan, U. S. Marshal. By G. White, Deputy. [10]

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FIDELITY AND DEPOSIT COMPANY OF  
MARYLAND.

HOME OFFICE: BALTIMORE, MARYLAND.

PACIFIC DEPARTMENT OFFICE.

601 Insurance Exchange Building,  
San Francisco, Cal.

(The premium charged for this bond is \$1000.00  
Dollars per annum.)

(Title of Court and Cause.)

**(Replevin Bond.)**

WHEREAS, it is alleged by the plaintiff in the above-entitled action that the defendant in said action has in his possession and unjustly detains certain personal property belonging to said plaintiff to the said possession of which the said plaintiff is lawfully entitled, of the value of One Hundred Thousand and 00/100 (\$100,000.00) Dollars, and



WHEREAS, the said plaintiff being desirous of having the said personal property delivered to it and by endorsement in writing upon the affidavit has required the marshal of San Francisco, State of California, to take the said property from said defendant;

NOW, THEREFORE, we, Sterling Tire Corporation, as principal, and Fidelity and Deposit Company of Maryland, a corporation created, organized and existing under and by virtue of the laws of the State of Maryland and duly licensed for the purpose of making, guaranteeing or becoming surety upon bonds or undertakings required or authorized by laws of the State of California, as surety, hereby agree and undertake and are bound to said defendant and to E. E. Gerlinger, individually and as a member of an alleged copartnership trading under the fictitious [11] name of Sterling Tire Company of California, in consideration of said delivery, in the sum of Two Hundred Thousand and 00/100 (\$200,000.00) Dollars, being double the value as stated in the plaintiff's affidavit herein for the prosecution of the action, for the return of the property to the said defendant, if return thereof be adjudged, and for payment to the said defendant and to said E. E. Gerlinger, individually and as a member of the aforesaid alleged copartnership, of such sum as may, for any cause, be recovered against said plaintiff.

IN WITNESS WHEREOF, we have hereunto set our hands and seals this 10th day of June, A. D. 1920.

STERLING TIRE CORPORATION, (Seal)  
FIDELITY AND DEPOSIT COMPANY  
OF MARYLAND. (Seal)

By C. H. BENNETT,  
Attorney-in-fact.

Attest: A. C. HOEPNER,  
Agent.

This undertaking is hereby approved this 24th day of June, 1920.

J. B. HOLOHAN,  
U. S. Marshal.  
By G. White,  
Deputy.

United States Marshal's Office.  
San Francisco, California.

Received Jun. 24, 1920, 11 A. M.

J. B. HOLOHAN,  
U. S. Marshal.  
By G. White,  
Deputy.

[Endorsed]: Filed Jul. 8, 1920. Walter B. Mal-  
ling, Clerk. [12]

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(Title of Court and Cause.)

**Answer to Complaint.**

Comes now the defendant, John M. Sullivan, as Receiver of an alleged copartnership consisting of

E. E. Gerlinger and G. R. Hickok and trading under the fictitious name of Sterling Tire Company of California, and answering the complaint of plaintiff herein, admits, alleges and denies as follows, to wit:

I.

Admits the allegations of paragraph I and II of plaintiff's complaint and the allegation of paragraph III down to and including the words "hereinafter described" in line 11 page 2, and denies that the property was owned by plaintiff, and denies that plaintiff was entitled to the possession of said property, and in this behalf defendant alleges that this defendant took possession of said property as said Receiver under and by virtue of said order appointing him Receiver, and was holding said property under said order of said Court appointing him said Receiver pending the determination by said Court of said action and the rights of the parties thereto and the rights to the possession thereof.

II.

Defendant admits the allegation of paragraph IV.

III.

Defendant alleges he has no information or belief sufficient to enable him to answer paragraph V, and placing his denial on said grounds, defendant denies that on or about the 7th day of May, 1920, or at any time or at all, plaintiff was and/or now is the owner, and/or entitled to the possession of the personal property described in paragraph V, and in this behalf defendant alleges that said defendant claimed possession and was in the possession of said property, and entitled to the [13] posses-

sion of said property by reason of the receivership as hereinbefore and in said complaint alleged.

IV.

Defendant admits the allegation of paragraph VI.

V.

Defendant denies that on or about the 7th day of May, 1920, or at any time at all without plaintiff's consent defendant wrongfully took possession of said personal property, and/or still retains possession thereof, and defendant admits that defendant claims to be entitled to the possession of said personal property as Receiver of the aforesaid alleged copartnership, and by reason of his appointment and the orders of Court made as in said complaint alleged in paragraph III thereof.

VI.

Defendant admits the allegations of paragraph VIII.

VII.

Defendant denies the allegations of paragraph IX that defendant still unlawfully holds and/or retains said personal property from the possession of plaintiff to plaintiff's damage in the sum of \$100,000.00, or in any sum or amount whatsoever.

VIII.

Defendant denies that in the pursuit of the possession of said personal property, and/or in his efforts to regain the possession thereof, plaintiff has incurred liability or suffered damage in the sum of \$5000.00, or in any sum or amount whatsoever.

IX.

Defendant admits the allegations of paragraph XI

and in this behalf alleges that said property was taken by defendant under and by virtue of his appointment as Receiver, and under the orders of the Superior Court of the City and County of [14] San Francisco made in said action No. 106555 as alleged in plaintiff's complaint.

X.

Defendant denies that prior to the commencement of this action, plaintiff obtained permission from the Superior Court of the State of California, in and for the City and County of San Francisco, in said action paragraph XII named, that plaintiff herein could bring said action against said Receiver as it might be advised.

XI.

Defendant alleges that said action No. 106,555, Superior Court of the City and County of San Francisco, and referred to in paragraph III of plaintiff's complaint, is still pending and undetermined, and that there is pending and undetermined a motion and proceeding to fix the compensation of said defendant as Receiver and his attorney, Edgar D. Peixotto; that said defendant as such Receiver has not had his account with reference to the receivership settled and allowed in said action, and that there are various sums of money due to him for expenses of the receivership and property chargeable against said property, all of which are yet undetermined by said Superior Court in said action; that defendant claims a lien upon the property mentioned in plaintiff's complaint and which he is entitled to the possession of

for the payment of his fees as Receiver, fees incurred for attorney, expenses and disbursements incurred in the Receivership.

And for further and separate defense, defendant alleges that this Court has no jurisdiction of the person of the defendant, or of the subject of the action.

WHEREFORE, defendant prays that plaintiff take nothing by the said complaint, that the possession of said personal property be returned to defendant, and for such other and [15] further relief as may be meet and proper and equitable, and for costs of suit.

EDGAR D. PEIXOTTO,  
Attorney for Defendant.

State of California,  
City and County of San Francisco,—ss.

John M. Sullivan, being duly sworn, deposes and says: That he is the defendant in the above-entitled action; that he has read the foregoing answer to complaint and knows the contents thereof, that the same is true of his own knowledge, except as to the matters which are therein stated on information or belief, and as to those matters that he believes it to be true.

JOHN M. SULLIVAN.

Subscribed and sworn to before me this 10th day of September, 1920.

[Seal] ALICE SPENCER,  
Notary Public in and for the City and County of  
San Francisco, State of California.



Due service and receipt of copy of the within answer is hereby admitted this 10th day of September, 1920.

HOWARD HARRON and  
McNAIR & STOKER,  
Attorneys for Plaintiff.

[Endorsed]: Filed Sept. 10, 1920. Walter B. Maling, Clerk. [16]

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(Title of Court and Cause.)

**Order Granting Leave to Intervene.**

Comes now E. E. Gerlinger and moves the above-entitled court for leave to intervene in the above-entitled action and to file his verified complaint in intervention therein, and it appearing to the Court from said complaint in intervention that the said E. E. Gerlinger has an interest in the matter in litigation in said action and in the success of the defendant therein and other good cause appearing therefor;

IT IS HEREBY ORDERED that the said E. E. Gerlinger have and he is hereby granted leave to intervene in said action and to file his said complaint in intervention herein.

Dated: this 10th day of September, 1920.

M. T. DOOLING,  
Judge of said District Court.

[Endorsed]: Filed Sept. 10, 1920. Walter B. Maling, Clerk. [17]

(Title of Court and Cause.)

**Complaint in Intervention.**

Now comes E. E. Gerlinger and by leave of Court first had and obtained intervenes in the above-entitled action and files this as his complaint in intervention, and as and for the grounds of his said intervention complains and alleges:

I.

That said E. E. Gerlinger and G. E. Hickok, at all times herein mentioned have been and now are copartners doing business under the fictitious firm name and style of Sterling Tire Company of California.

II.

That plaintiff herein, Sterling Tire Corporation, is a corporation duly organized and existing under and by virtue of the laws of the State of New Jersey.

III.

That on<sup>e</sup> or about the 20th day of April, 1920, said G. R. Hickok for and on behalf of said Sterling Tire Company of California, a copartnership, entered into a contract with said Sterling Tire Corporation, plaintiff herein, wherein and whereby the said Sterling Tire Corporation agreed to consign to said Sterling Tire Company of California the following personal property consisting of automobile tires, tubes and casings, more particularly described, as follows, to wit: [18]



Cord Casings.	Fabric Casings.	Tubes.
4 40 x 8	5 35 x 5	8 28 x 3 — 29 x 3½
4 38 x 7	8 33 x 5	55 30 x 3
30 36 x 6	8 36 x 4½	298 30 3½—31 x 4
21 37 x 5	16 35 x 4½	30 33 x 4
6 36 x 5	9 34 x 4½	82 32 x 3½—33 x 4
213 35 x 5	10 33 x 4½	10 33 x 4½
78 33 x 5	7 32 x 4½	47 32 x 4 — 33 x 4½
37 36 x 4½	44 34 x 4	31 32 x 4½—33 x 5
81 35 x 4½	22 33 x 4	79 34 x 4½—35 x 5
83 34 x 4½	36 32 x 4	25 36 x 4½—37 x 5
72 33 x 4½	9 31 x 4	4 38 x 7
190 32 x 4½	99 32 x 3½	4 40 x 8
191 34 x 4	248 30 x 3½ Standard	20 34 x 4 — 35 x 4½
199 33 x 4	215 30 x 3½ Trojan	30 36 x 4
242 32 x 4	290 30 x 3½ Super	
100 32 x 3½	5 29 x 3½	
46 30 x 3½	85 30 x 3	
	6 28 x 3	

That it was provided in and by the terms of said agreement that said personal property and the whole thereof would be consigned to said Sterling Tire Company of California for a period of one hundred and twenty (120) days, and that in the meantime said Sterling Tire Company of California would have the right to the possession thereof and the right to sell the same for a profit; it was further provided in and by the terms of said contract that said Sterling Tire Company of California should pay for all tires, tubes and casings delivered from the consigned stock, on the first day of each week following delivery and that said Ster-

ling Tire Company of California should pay to the said Sterling Tire Corporation therefor, the regular published trade list price of said property less than twenty per cent (20%), five per cent (5%) and five per cent (5%).

#### IV.

Thereafter and on or about the 28th day of April, 1920, pursuant to the terms and conditions of said contract, said Sterling Tire Corporation, plaintiff herein, delivered to said Sterling Tire Company of California the said personal property hereinabove described and the whole thereof. [19]

#### V.

That the property hereinabove described is the same property described in plaintiff's complaint herein.

#### VI.

That the said E. E. Gerlinger, plaintiff in intervention herein, heretofore and upon the 7th day of May, 1920, commenced an action in the Superior Court of the State of California, in and for the City and County of San Francisco against said G. R. Hickok, which said action is numbered 106,555 in the records of the County Clerk of said City and County of San Francisco, for the dissolution of said copartnership and for the appointment of a receiver over the property and assets thereof pending the litigation; thereafter and on or about the 7th day of May, 1920, by an order duly given and made, the said Superior Court appointed John M. Sullivan, defendant herein, receiver of the prop-

erty and assets of said copartnership which said property and assets included the right to sell and to the possession of the tires, tubes and casings hereinabove described, subject only to a requirement to account for a portion of the proceeds of the sale thereof as in said contract provided; that thereafter and on or about the 10th day of May, 1920, said receiver took possession of the property and assets of said copartnership pursuant to said order of Court and took possession of the tires, tubes and casings hereinabove described and described in plaintiff's complaint.

#### VII.

That at the time of the commencement of this action said contract between said Sterling Tire Corporation, plaintiff herein, and said Sterling Tire Company of California, a copartnership, was in full force and effect, not rescinded, canceled or annulled, and said copartnership, the Sterling Tire Company of California, had done and performed all of the terms and conditions thereof on its part to be kept and performed up to [20] the said date on which said receiver took possession of the property and assets of said copartnership, and thereafter said Receiver had and has done and performed all of the terms and conditions of said contract on the part of said Sterling Tire Company of California to be kept and performed thereunder, except in so far as he was prevented therefrom by the acts of said Sterling Tire Corporation, plaintiff herein.

WHEREFORE, said E. E. Gerlinger, plaintiff in intervention herein, prays that plaintiff herein take nothing by its said complaint and that judgment be rendered in favor of said John M. Sullivan as said receiver, defendant herein, and for costs of suit herein incurred.

ROY A. BRONSON,  
Attorney for Plaintiff in Intervention.

State of California,  
City and County of San Francisco,—ss.

Roy A. Bronson, being first duly sworn, deposes and says:

That he is the attorney for E. E. Gerlinger, plaintiff in intervention herein; that he has and maintains his office as such attorney, in the City and County of San Francisco, State of California; that said E. E. Gerlinger is absent from said City and County and at date hereof is unable to make this verification and for that reason affiant makes this verification for and on behalf of said E. E. Gerlinger.

That he has read the foregoing complaint in intervention and knows the contents thereof; and that the same is true of his own knowledge, except as to those matters therein stated on his information and belief and as to those matters [21] he believes it to be true.

ROY A. BRONSON.

Subscribed and sworn to before me this 27th day of August, 1920.

[Seal]

ETTA LAIDLAW,

Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed Sept. 10, 1920. Walter B. Maling, Clerk. [22]

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(Title of Court and Cause.)

**Plaintiff's Answer to Complaint in Intervention of  
E. E. Gerlinger.**

Comes now the plaintiff above named and for answer to the complaint in intervention filed herein by E. E. Gerlinger admits, denies and alleges as follows:

I.

Alleges that it has no information or belief sufficient to enable it to answer paragraph I of said complaint in intervention, and placing its denial on said grounds, plaintiff denies that said E. E. Gerlinger and G. R. Hickok at all times mentioned in said complaint in intervention, or at all, have been or now are copartners doing business under the fictitious name and style of Sterling Tire Company of California, or otherwise or at all.

II.

Denies that on or about the 20th day of April, 1920, or at any other time, or times, or at all, said G. R. Hickok, for and/or on behalf of said Sterling Tire Company of California, a copartner-

ship, or at all, entered into a contract with plaintiff wherein and whereby, or wherein or whereby, plaintiff agreed to consign to said Sterling Tire Company of California, or to any other person, or at all, the personal property described in paragraph III, of said complaint in intervention, or any part thereof, or any other property of any description whatsoever; and denies that by the terms of said, or any, agreement it was provided that the said personal property, or any part thereof, would be consigned to said Sterling Tire Company of California, or to any other person, or at all, for a period of [23] 120 days, or for any other period of time, or at all, and/or that in the meantime, or at all, said Sterling Tire Company of California, or any other person, would have the right to the possession of said personal property, or any part thereof, and/or the right to sell the same, or any part thereof, for a profit, or otherwise, and further denies that it was further provided by the terms of said contract, or at all, that said Sterling Tire Company of California, or any other person, or at all, should pay for all or any of the tires, tubes and casings, or either thereof, delivered from said alleged consigned stock, on the first day of each week following delivery, or at any other time, or at all, and/or that said Sterling Tire Company of California, or any other person, or at all, should pay to plaintiff therefor the regular, or any, published, or other, trade list price of said property, or any part thereof, less than 20%, 5%, and 5%, or less any percentage, or at all.



III.

Denies that thereafter and on or about the 28th day of April, 1920, or at all, pursuant to the terms and/or conditions of said contract, or at all, plaintiff delivered to said Sterling Tire Company of California, or to any other person, or at all, the said personal property referred to, or any part thereof.

IV.

Denies that the property and assets, or either of them, of said alleged copartnership, included the right to sell and to [24] the possession, or either thereof, of the tires, tubes and casings, or either or any part thereof, in said complaint in intervention described, subject only to a requirement to account for a portion of the proceeds of the sale thereof as in said alleged contract, or otherwise, provided.

V.

Denies that at the time of the commencement of this action said alleged contract, or any contract, between plaintiff and said Sterling Tire Company of California, a copartnership, or any other person, or at all, was in full force and effect, not rescinded, cancelled or annulled, or either thereof, or at all, and denies that said alleged copartnership had done and performed, or done or performed, all or any of the terms and conditions, or terms or conditions, of said alleged contract, on its part to be kept and performed up to the alleged date on which the Receiver referred to in said complaint in intervention took possession of the property and assets

of said alleged copartnership, and further denies that thereafter, or at all, said Receiver has done and performed all or any of the terms and conditions of said alleged contract on the part of said Sterling Tire Company of California, or any other person, to be kept and performed, thereunder or at all; and in this behalf plaintiff alleges that neither at the time of the commencement of this action, nor at any other time, nor at all was there any contractual relation between the plaintiff herein and said Sterling Tire Company of California, an alleged copartnership, of any kind or character whatsoever.

WHEREFORE plaintiff prays that the relief demanded by said E. E. Gerlinger in his said complaint in intervention be denied, and that plaintiff have judgment as prayed in its complaint on file herein.

HOWARD HARRON and  
McNAIR & STOKER,

Attorneys for Plaintiff. [25]

State of California,

City and County of San Francisco,—ss.

Geo. E. Stoker, being first duly sworn, deposes and says: That he is one of the attorneys for plaintiff in the above-entitled action, and that this affiant has his office in the City and County of San Francisco, State of California. That the plaintiff in said action, Sterling Tire Corporation, is a corporation organized and existing under the laws of the State of New Jersey, and plaintiff and each and all



of the officers of plaintiff are absent from the said City and County of San Francisco, and are therefore unable to verify the foregoing answer; and for that reason this verification is made by this affiant. That this affiant has read the foregoing answer and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters which are therein stated on information or belief, and as to those matters that he believes it to be true.

GEO. E. STOKER.

Subscribed and sworn to before me this 13th day of September, 1920.

[Seal]

H. F. HOBSON.

Notary Public.

Service and receipt of a copy of the within answer hereby acknowledged this 13th day of September, 1920.

ROY A. BRONSON,

Attorney for Intervenor.

[Endorsed]: Filed Sept. 15, 1920. Walter B. Maling, Clerk. [26]

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(Title of Court and Cause.)

**Stipulation Waiving Jury.**

It is hereby stipulated and agreed by and between the parties hereto that the above-entitled action may, with the consent of the Court, be tried by the Court, and that a trial by jury be waived.

Dated: February 23d, 1921.

HOWARD HARRON and  
McNAIR & STOKER,

Attorneys for Plaintiff.

EDGAR D. PEIXOTTO,

Attorney for Defendant.

ROY A. BRONSON,

Attorney for Intervenor.

Approved.

WM. C. VAN FLEET,

Judge.

[Endorsed]: Filed Mch. 21, 1921. Walter B.  
Maling, Clerk. [27]

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(Title of Court and Cause.)

**Judgment.**

This cause came regularly on for trial this 20th day of May, 1921, before the Court, a jury having been waived by written stipulation of the parties, the plaintiff appearing by Howard Harron, Esq., and McNair & Stoker, its attorneys, the defendant in person, and by Edgar D. Peixotto, his attorney, and the above-named intervenor by Roy A. Bronson, his attorney. Evidence, oral and documentary, was introduced on behalf of the respective parties, and after the arguments of counsel said cause was submitted to the Court for decision, whereupon the Court ordered judgment in favor of the plaintiff and against the defendant for the possession of the property described in plaintiff's complaint, but with-

out damages for its detention, and without costs, subject to the lien, upon said property in the sum of \$2,676.67 in favor of said defendant as adjudged by the Superior Court of the State of California, in and for the City and County of San Francisco, in that certain action therein entitled E. E. Gerlinger vs. G. R. Hickok, numbered 106,555.

It is therefore ORDERED AND ADJUDGED that plaintiff have and recover the possession of all of the property described in plaintiff's complaint herein, without damages for its detention, and without costs, upon the plaintiff paying into Court the sum of \$2,676.67 adjudged as a lien against said property by the Superior Court of the State of California, in and for the City and County of San Francisco, in an action entitled E. E. Gerlinger v. G. R. Hickok, numbered 106,555, in satisfaction of the services of the receiver in said Superior Court and his attorney; or in lieu of such payment into court that the plaintiff pay said sum to the attorney for said receiver and file with the clerk of this court [28] the duly signed receipt of said attorney for such payment.

Judgment entered May 20, 1921.

WALTER B. MALING,

Clerk. [29]

In the Southern Division of the District Court of  
the United States, in and for the Northern Dis-  
trict of California, Second Division.

No. 16,392.

STERLING TIRE CORPORATION,

Plaintiff,

vs.

JOHN M. SULLIVAN, as Receiver of an Alleged  
Copartnership Consisting of E. E. GERLIN-  
GER and G. R. HICKOK and Trading  
Under the Fictitious Name of STERLING  
TIRE COMPANY OF CALIFORNIA,

Defendant.

E. E. GERLINGER,

Intervenor.

**Plaintiff's Bill of Exceptions.**

BE IT REMEMBERED, that on the 20th day of  
May, 1921, the above-entitled cause came on for trial  
before the Court, a jury having been waived by  
written stipulation of the parties, Honorable Will-  
iam C. Van Fleet presiding. The plaintiff appeared  
by Howard Harron and McNair & Stoker, its coun-  
sel; the defendant appeared in person and by Edgar  
D. Peixotto, his counsel; the intervenor appeared  
by Roy A. Bronson, his counsel. Thereupon pro-  
ceedings were had as follows:

The following facts were proved at the trial, either  
by the undisputed evidence or by the admissions of  
counsel for the respective parties:

In April, 1920, plaintiff sent its representative, E. R. Northrop, to San Francisco to adjust an unsatisfactory business relation with one Warren, who was plaintiff's agent for the sale of the automobile tires and tubes replevined in this action, Northrop made an adjustment with Warren, and on behalf of the plaintiff accepted from Warren the return of this property.

Northrop then sought a new representative to handle these tires which plaintiff owned. He met E. E. Gerlinger, the intervenor herein, and offered Gerlinger the agency, but the proposition [30] was too big for him to handle. Gerlinger then introduced Northrop to one G. R. Hickok. Negotiations between Northrop, Hickok and Gerlinger led to the formulation of a contract, which provided, in effect, for the consignment by the plaintiff to the Sterling Tire Company of California, upon stated terms and conditions, of these tires and tubes. This contract was signed by Hickok on behalf of the Sterling Tire Company of California, the party of the second part, on April 20, 1920. Northrop immediately forwarded the contract to the plaintiff at its factory and office, in New Jersey, for approval. He delivered possession of the said tires and tubes to the Sterling Tire Company of California, as custodian, pending the acceptance or rejection of the proposed contract by the plaintiff. Plaintiff refused to accept the contract, and it was never executed on behalf of plaintiff.

On May 5, 1920, prior to plaintiff's decision to reject the proposed contract, Gerlinger brought an

action in the Superior Court of the State of California, in and for the City and County of San Francisco, against Hickok, claiming that the Sterling Tire Company of California was the fictitious name of a copartnership consisting of himself and Hickok; that Hickok had refused to recognize him as a partner; that the partnership assets consisted of the contract above referred to, and the right to the possession and sale of the tires and tubes in said contract specified, being the property replevined herein. Gerlinger asked for a dissolution of the alleged copartnership, an accounting, and the appointment of a receiver to take possession of the partnership assets and conduct the partnership business. Plaintiff herein was not made a party to that action.

Hickok answered denying any copartnership relation with Gerlinger; and alleged that the Sterling Tire Company of California was the fictitious name of the National Finance Company, a corporation [31] in which he (Hickok) was interested; and further alleged that the Sterling Tire Company of California merely held possession of the aforesaid tires and tubes as custodian for the Sterling Tire Corporation, plaintiff herein, pending the acceptance or rejection by the Sterling Tire Corporation of the aforesaid proposed contract, but that the Sterling Tire Corporation rejected the contract, and that no contract in fact was ever made between the Sterling Tire Corporation and the Sterling Tire Company of California.

In said action of Gerlinger vs. Hickok the State Court appointed the defendant herein, John M. Sulli-



van, receiver, as prayed by the plaintiff in that cause. This appointment was made without notice to the defendant, but the order was conditioned upon Gerlinger first filing a bond in the sum of \$1,000 to indemnify the defendant (Hickok) against damage in case the appointment of the receiver was procured wrongfully, maliciously or without sufficient cause. The following is a copy of the order of the Court appointing said receiver:

(Title of Court and Cause.)

Upon reading and filing the verified Complaint of plaintiff on file herein and good cause appearing therefor, on motion of Roy A. Bronson, Esq., Attorney for plaintiff herein:

IT IS HEREBY ORDERED that John M. Sullivan be and he is hereby appointed Receiver of the partnership of plaintiff and defendant and of the Sterling Tire Company of California and all of the property and assets thereof, which said partnership and said property and assets thereof are more fully set forth in the Complaint of plaintiff on file herein.

IT IS FURTHER ORDERED that said John M. Sullivan as such Receiver proceed immediately to take possession of the assets of said partnership of plaintiff and defendant and of said Sterling Tire Company of California and until further order of this Court to continue and carry on the business on behalf of said partnership under said firm name and style of Sterling Tire Company of California, of the sale and distribution within the States of California, Nevada and Arizona of the tires and tubes consigned to said partnership and said Sterling Tire Company

of California by the Sterling Corporation, of New Jersey, and to carry out all the terms and conditions of the contract between said Sterling Tire Company of California and said Sterling Tire Corporation, a copy of which said contract is attached to plaintiff's Complaint herein and marked Exhibit "A."

IT IS FURTHER ORDERED that until further order of this Court said John M. Sullivan as such Receiver may pay out and expend out of any moneys realized by him on the sale and distribution [32] of said tires and tubes, as aforesaid, all sums of money necessarily incident to the conducting and carrying on of said business as expenses of said business but said Receiver is hereby directed not to part with or expend in any manner whatsoever any of the proceeds of said business; and

IT IS FURTHER ORDERED that said receiver retain said profits until further order of this Court.

IT IS FURTHER ORDERED that the above order appointing said John M. Sullivan as such receiver as aforesaid is conditioned upon the plaintiff first filing with the clerk of the above-entitled Court an undertaking with sufficient sureties in the sum of \$1000.00 to the effect that the plaintiff will pay to the defendant all damages he may sustain by reason of the appointment of said John M. Sullivan as such receiver and the entry by him upon his duties, in case the plaintiff shall have procured such appointment wrongfully, maliciously or without sufficient cause.

IT IS FURTHER ORDERED that before entering upon his duties, said receiver be sworn to



perform them faithfully and that he file herein an undertaking to the State of California in the sum of \$500.00 to the effect that he will faithfully discharge the duties of receiver in this action and obey the orders of the Court herein.

Done in open Court, this 6th day of May, 1920.

E. P. SHORTALL,

Judge of said Superior Court.

The receiver qualified, and under the aforesaid order appointing him he took possession on May 10, 1920, of the tires and tubes herein involved. The bond referred to in the foregoing order was approved and filed prior to the time the receiver went into possession.

The day following the taking of possession by the receiver, Mr. Harron, attorney for Hickok, went to Judge Shortall's court, and Roy A. Bronson, attorney for Gerlinger, was requested by telephone to attend the conference. Mr. Harron was insisting on a bond in excess of \$1,000. Mr. Bronson pointed out to the Court that plaintiff was only claiming a possessory right and did not claim ownership. Judge Shortall then ordered plaintiff to give an undertaking in the sum of \$5,000 and thereupon Gerlinger put up a bond for \$4,000 in addition to the bond for \$1,000 theretofore filed and approved.

On the motion to discharge the receiver Mr. Harron stated that he had been authorized to represent the Sterling Tire Corporation, and he read

in open court from the witness stand a telegram [33] from the Sterling Tire Corporation of Ruthersford, N. J., authorizing him to act as their attorney and protect their interests. Harron said to the Court that these tires were of great value, and particularly that this property, which the Sterling Tire Corporation claimed Hickok had no right to, was liable to be subjected to proceedings here, and he insisted that the Court make a bond in favor of the Sterling Tire Corporation. Mr. Bronson argued that the Sterling Tire Corporation was not a party to this action and had its proper rights. Harron, however, insisted that the bond be made made not only in favor of the Sterling Tire Corporation but in favor of the National Finance Company, also represented by him. The Court then ordered Gerlinger to give a new bond, in the sum of \$5,000, running not only to Hickok but to the Sterling Tire Corporation and the National Finance Company. The following day, May 18, 1920, Gerlinger complied with this order, and obtained an order releasing the two former bonds. The new bond furnished by Gerlinger was approved by the Court and filed with the clerk, and was in words and figures as follows:

(Title of Court and Cause.)

Whereas, the above-named plaintiff is about to commence an action in the Superior Court of the City and County of San Francisco, State of California, entitled as above, and is about to apply to the Court for the appointment of a receiver to take

possession of the property in the complaint described, and to preserve the same, under the orders of the said Court:

Now, therefore, we the undersigned in consideration of the premises and of the appointment of the receiver herein, do jointly and severally undertake in the sum of \$5,000, and promise to the effect that in case said receiver shall be appointed that plaintiff will pay to said defendant or Sterling Tire Corporation of Rutherford, New Jersey, or National Finance Co., a corporation, such damages, not exceeding the sum of \$5,000, which the defendant or Sterling Tire Corporation of Rutherford, New Jersey, or said National Finance Co., a corporation, may sustain by reason of the appointment of such receiver and the entry by him upon his duties, in case the plaintiff shall have procured such appointment wrongfully.

Dated May 7, 1920.

[Seal] LION BONDING & SURETY CO.

By JESSE M. WHITED,

Its Attorney in Fact.

Hickok moved the State Court to vacate the order appointing [34] the receiver. Said motion was heard on May 19, 1920, and May 21, 1920, and was denied by the Court on May 22, 1920.

On May 24, 1920, the receiver served and filed the following notice of motion:

**Notice of Motion of Receiver for Direction and Compensation.**

To the Plaintiff, E. E. Gerlinger, and His Attorney Roy A. Bronson, Esq., and to the Defendant G. R. Hickok and His Attorney, Howard Harron Esq.:

Please take notice that on Thursday, the 27th day of May, 1920, at the courtroom of the above-entitled court in the City Hall in the City and County of San Francisco, Department No. 15 thereof at 10 o'clock in the forenoon of said day, or as soon thereafter as counsel can be heard, John M. Sullivan, the receiver heretofore appointed in the above-entitled action, will make the following motions and will move the Court for the following orders, to wit:

I.

For an order directing the course and conduct of the Receiver with reference to the mode and manner of carrying on the business and upholding the property of the copartnership *pendente lite*.

II.

For an order fixing, determining and securing a reasonable compensation for the receiver *pendente lite*.

III.

For an order fixing, determining and securing a reasonable compensation for Edgar D. Peixotto, attorney for said receiver *pendente lite*.

IV.

For such other and further orders as may be

necessary for the preservation of the property and the conservation of the rights of all the parties *pendente lite*. Said motions will be made upon the grounds that the parties to the action will not agree as to the course and conduct of the receiver, or as to the compensation of the receiver, or his attorney, and that it is for the best interest of the parties that such orders and directions be made.

Said motion will be made upon this notice, and all the papers, files and documents in said cause, and upon such further testimony, oral and documentary, as may be introduced at the hearing thereof.

Dated May 24th, 1920.

(Signed) EDGAR D. PEIXOTTO,  
Attorney for John M. Sullivan,  
Receiver.

Service of the within notice, etc., and receipt of a copy thereof is hereby admitted this 24th day of May, 1920.

(Signed) ROY A. BRONSON,  
Attorney for Plaintiff.

(Signed) HOWARD HARRON,  
Atty. for Deft.

The foregoing motion was heard on the 27th day of May, 1920. At the hearing thereof Geo. E. Stoker appeared specially and stated that he had been retained by the Sterling Tire Corporation and was to be associated with Mr. Howard Harron on behalf of the Sterling Tire Corporation, and requested that no order be made [35] respecting the sale or disposition of these tires until he could

communicate with the Sterling Tire Corporation and ascertain their wishes and the facts of the case; that the tires were of great value; that the Sterling Tire Corporation was not a party to the action and did not recognize either Gerlinger's or Hickok's claim of right to the tires, and that a sale of the tires by a receiver might be prejudicial to the business and standing of the Sterling Tire Corporation. Thereupon an order was prepared by the various attorneys and O. K.'d by them. The "Stoker" who O. K.'d the order is the same Stoker who appeared specially as above stated. Said order was signed by the Court, and was as follows:

(Title of Court and Cause.)

**Order Directing Receiver in His Duties.**

The motion of the Receiver herein for an order directing him as to the management of the business of the alleged copartnership between plaintiff and defendant, and directing him as to the possession of the alleged copartnership property, came on regularly for hearing on this day, all of the parties being present in person and by their respective attorneys.

And it appearing to the Court that the principal asset of said copartnership is a contract alleged by plaintiff to exist between said copartnership, on the one part, and the Sterling Tire Corporation of Rutherford, New Jersey, on the other, covering the terms and conditions under which certain automobile tires and tubes belonging to said Sterling



Tire Corporation, and now in the possession of the Receiver herein, may be sold.

And it further appearing that there is dispute as to the existence of any contract between said Sterling Tire Corporation and said alleged copartnership, and a dispute as to the right of any person to make any sale of the tires or tubes now in the possession of said Receiver without the consent and authority of said Sterling Tire Corporation; the said Sterling Tire Corporation appearing specially in this matter by their attorneys Howard Harron and McNair & Stoker, and participating herein for the purpose of this motion and order only;

And it further appearing that it is necessary for the Court to determine the existence, terms and conditions of such alleged contract, and that the presence of said Sterling Tire Corporation as a party to this action will aid the Court in said determination;

NOW, THEREFORE, IT IS HEREBY ORDERED that if said Sterling Tire Corporation enters its voluntary appearance herein on or before June 10, 1920, and on or before July 6, 1920, files its answer, complaint in intervention, or other pleading herein setting up its claim of title to the automobile tires and tubes above referred to, and its claim as to the existence or nonexistence of the contract set out as Exhibit "A" to plaintiff's complaint, then said Receiver shall hold all of said automobile tires and tubes intact to abide further

order of this Court; but in the event that said Sterling Tire Corporation does not, on or before June 10, 1920, enters its voluntary appearance herein, or, having entered its voluntary appearance herein on or prior to June 10, 1920, does not file its answer or other pleading herein on or before July 6, 1920, setting forth its claim as to the property now in said Receiver's hands, then said Receiver may at once apply to this Court for further direction as to the performance of his duties. [36]

It is further ordered that the Receiver may sell said tires and tubes or any of them, but only with the consent and upon such terms as may be approved by said Sterling Tire Corporation of Rutherford, New Jersey, or its authorized agents.

It is further ordered that the matter of fixing the fees of the Receiver and counsel fees be continued to the further order of this Court.

It is further ordered that the foregoing Order is conditioned upon the said Sterling Tire Corporation filing herein concurrently with its voluntary appearance a stipulation to the effect that the time covered by the pendency of this action shall not be computed as a part of the time referred to in those certain paragraphs of Exhibit "A" to plaintiff's complaint herein, reading as follows, to wit:

Party of the first part (Sterling Tire Corporation of Rutherford, New Jersey) agrees to consign for one hundred twenty (120) days approximately \$100,000.00 worth of tires and tubes, receipt of which is hereby acknowledged as per attached inventory.

IT IS FURTHER AGREED that the party of the first part shall reserve the right to cancel this contract on 30 days' notice if the party of the second part (Sterling Tire Company of California) fails during any three months period of this contract to order 25% of the total amount of contract.

Done in open Court, this twenty-eighth day of May, 1920.

E. P. SHORTALL,

Judge of said Superior Court.

O. K.—STOKER.

O. K.—R. A. BRONSON.

O. K.—HOWARD HARRON.

O. K.—EDGAR D. PEIXOTTO.

After said order of May 28, 1920, was made, and up to the date that the property replevined in this action was taken by the marshal, said Receiver retained possession of said property; but no business of the alleged copartnership was transacted during said period of time, by said Receiver, nor did he, during said period, sell any of said property or attempt to do so.

The following order was also made by said Court:  
(Title of Court and Cause.)

**Order Granting Permission to Sue Receiver.**

Good cause appearing therefor, IT IS HEREBY ORDERED that the Sterling Tire Corporation of Rutherford, New Jersey, and the National Finance Company, a corporation, or either of them, may jointly or severally bring such action as either may desire, whether in replevin or otherwise, and in

either the courts of the State of California or of the United States, against John M. Sullivan, the Receiver herein, to determine the right of ownership or possession of any or all of the property seized and now possessed by said Receiver under the order of this Court appointing said Receiver.

Dated this 14th day of June, 1920, as of the 24th day of May, 1920.

E. P. SHORTALL,  
Judge. [37]

Thereafter, and on the 2d day of March, 1920, the Court made the following order in said cause:

(Title of Court and Cause.)

**Order Allowing Receiver's Compensation on Account.**

The motion of John M. Sullivan, the receiver herein, for an order fixing, determining and securing a reasonable compensation for the receiver *pendente lite*, and on account, and for fixing, determining and securing a reasonable compensation to be paid the receiver as and for fees and services of his attorney, Edgad D. Peixotto, coming on regularly to be heard, said receiver being represented by his attorney, Edgar D. Peixotto and plaintiff being represented by his attorneys, Roy A. Bronson and F. J. Blake, and the defendant being represented by his attorney, Howard Harron, and evidence as to the services and work performed by said receiver and his attorney having been offered and heard by the Court and good cause appearing therefor.

IT IS HEREBY ORDERED that said John M. Sullivan, as receiver in the above entitled action be, and he is hereby awarded and allowed the sum of ONE THOUSAND (\$1000.00) DOLLARS on account of his services as such receiver, and that said John M. Sullivan be awarded and allowed the sum of FIFTEEN HUNDRED (\$1500.00) DOLLARS for and on account of attorney's fees incurred in said receivership.

That the Court now reserves its decision and order as to which party or fund said amounts are payable by or from, and to the fixing of the final and full compensation in the matter and as to rendering and settlement of the receiver's account.

Done in open court this 2d day of March, 1921.

E. P. SHORTALL,

Judge of the Superior Court.

On April 6, 1921, the Receiver served on the attorneys for Gerlinger and Hickok and filed with the clerk a report and account of his proceedings showing that there was due the Receiver a total sum of \$2,676.67, with a prayer that such account be approved and allowed.

On April 15, 1921, said Court made the following order confirming said account of the Receiver:

(Title of Court and Cause.)

**Order Confirming Account of Receiver.**

The motion of John M. Sullivan, the Receiver herein for an order approving and confirming the report and account of said Receiver, and for an order fixing and determining the fund, or party or



parties charged with the money due said Receiver, coming on regularly to be heard, said Receiver being represented by his attorney, Edgar D. Peixotto, and plaintiff being represented by his attorney, Roy A. Bronson, and the defendant being represented by his attorney, Howard Harron, and evidence having been introduced in the matter and the Court being fully advised and good cause appearing therefor,

IT IS HEREBY ORDERED that the report and account of said Receiver be, and the same is settled, allowed and confirmed.

IT IS FURTHER ORDERED that the moneys due said Receiver as shown by said account and report be, and the same are hereby made [38] payable and ordered to be paid out of the fund or property which came into the hands, possession and control of said Receiver under and by virtue of his appointment and authority as such Receiver, and that said Receiver have a lien on said fund or property for his compensation and fees, and that said Receiver be, and he is hereby authorized to take such other and further proceedings as may be necessary to take said amount out of said fund, together with any such further or additional amount as may hereafter be allowed by this Court, this Court reserving the right to make any further and final determination with reference to the further allowance to said Receiver.

Done in open court this 15th day of April, 1921.

E. P. SHORTALL,

Judge of the Superior Court.



On April 20, 1921, after the trial of said cause, the Court made its findings of fact and conclusions of law, as follows:

(Title of Court and Cause.)

**Findings of Fact and Conclusions of Law.**

THIS CAUSE having regularly come on for trial before the Court, a trial by jury having been expressly waived by stipulation of the respective parties appearing therein, on the 2d day of March, 1921, and at such time subsequent thereto to which said cause was duly and regularly continued, Roy Bronson, Esq., and Frank J. Blake, Esq., appearing for the plaintiff and Howard Harron, Esq., for the defendant, and after hearing the allegations and proofs, oral and documentary, of the parties, and the arguments of the respective counsel, and the Court, being fully advised in the premises, hereby makes and files the following findings of fact and conclusions of law, constituting my decision in said action.

**FINDINGS OF FACT.**

1. That the plaintiff and defendant did not, on or about the 16th day of April, 1920, or at any time at all, enter into an oral or any other agreement at all, wherein and whereby plaintiff and defendant agreed to and did, or agreed to or did, become copartners for the purpose of engaging in the automobile tire and tube business or for any other purpose whatsoever.

2. That plaintiff did not on or about said 16th day of April, 1920, or at any other time, or at all,

enter into his or any duties as copartners of defendant; and

3. That upon motion of plaintiff duly made in that behalf after commencement of this action, and on or about the seventeenth day of May, 1920, this Court appointed John M. Sullivan Receiver in the above-entitled action, and that thereupon and forthwith said John M. Sullivan entered into and upon his duties as such Receiver and entered into, assumed and took possession of the personal property and the whole thereof, described in the complaint of plaintiff herein and therein alleged to be the property and assets of said alleged copartnership; that thereafter and on the twelfth day of May, 1920, this Court, after a full hearing in which all parties to this action were represented, made an order modifying the order theretofore made appointing the Receiver, and directed and instructed said Receiver in his duties; that thereafter and on or about the twenty-eighth day of May, 1920, after a full hearing in which all parties to this action were represented and to which the Sterling Tire Corporation of Rutherford, New Jersey, appeared especially and was represented for the purpose of said hearing only, claiming an interest in the tires and tubes described in plaintiff's complaint herein, this Court made an order directing said Receiver in his duties, which said order is hereby referred to and made a part of these Findings of Fact. [39]

As conclusions of law from the foregoing facts, the courts finds:

## CONCLUSION OF LAW.

That defendant is entitled to judgment for his costs herein. Let judgment be entered accordingly.

Dated: April 20th, 1921.

E. P. SHORTALL,  
Judge.

On April 20, 1921, the following judgment on said findings was entered:

(Title of Court and Cause.)

### **Judgment on Findings.**

This case came on regularly for trial, Messrs. Roy Bronson, Frank J. Blake appearing as counsel for plaintiff, and Howard Harron, Esq., for defendant. A trial by jury having been expressly waived by counsel for respective parties, the cause was tried before the Court sitting without a jury. Whereupon witnesses on the part of plaintiff and defendant were duly sworn and examined; and certain evidence both oral and documentary was introduced, the evidence being closed, the cause was submitted to the Court for consideration and decision, and after due deliberation thereon the Court delivers its findings and decision in writing, which is filed, and orders that judgment be entered in accordance therewith.

WHEREFORE, by reason of the law and the findings aforesaid, It is ORDERED, ADJUDGED AND DECREED that E. E. Gerlinger, plaintiff do take nothing by this said action as against G. R. Hickok, defendant, but that judgment be and the

same is hereby entered herein in favor of said defendant and against said plaintiff for said defendant's costs and disbursements incurred in this action, amounting to the sum of \$——.

Judgment entered April 20th, 1921.

Book 104, page 348, 4:40 P. M.

The cause was submitted to the Court for decision upon the pleadings and the foregoing facts.

Plaintiff requested the Court for judgment for the recovery of the possession of the property, free of any charge against it on behalf of the defendant, and for damages for its detention from May 10, 1920, to June 16, 1920, equivalent to legal interest for that period of time on the agreed value of the property.

Defendant requested the Court for judgment ordering plaintiff to conditionally return the property to the defendant for the purpose of closing the receivership.

Thereupon the Court ordered judgment in favor of the plaintiff for the return of the property, or its value, subject to the demand established by the State Court against the property in favor of the Receiver, but without damages for its detention. To which order and judgment plaintiff excepted at the time. [40]

In the Southern Division of the District Court of  
the United States, in and for the Northern  
District of California, Second Division.

No. 16,392.

STERLING TIRE CORPORATION,  
Plaintiff,

vs.

JOHN M. SULLIVAN, as Receiver of an Alleged  
Copartnership Consisting of E. E. GER-  
LINGER and G. R. HICKOK and Trading  
Under the Fictitious Name of STERLING  
TIRE COMPANY OF CALIFORNIA,  
Defendant.

E. E. GERLINGER,  
Intervenor.

**Stipulation Re Bill of Exceptions.**

It is hereby stipulated and agreed the foregoing  
bill of exceptions is correct, and that the same may  
be signed, settled and allowed by the Court.

Dated: October 17, 1921.

McNAIR & STOKER,  
Attorneys for Plaintiff.  
EDGAR D. PEIXOTTO,  
Attorney for Defendant.  
ROY A. BRONSON,  
Attorney for Intervenor. [41]

In the Southern Division of the District Court of  
the United States, in and for the Northern  
District of California, Second Division.

No. 16,392.

STERLING TIRE CORPORATION,

Plaintiff,

vs.

JOHN M. SULLIVAN, as Receiver of an Alleged  
Copartnership Consisting of E. E. GER-  
LINGER and G. R. HICKOK and Trading  
Under the Fictitious Name of STERLING  
TIRE COMPANY OF CALIFORNIA,

Defendant.

E. E. GERLINGER,

Intervenor.

**Order Settling Bill of Exceptions.**

This bill of exceptions having been duly pre-  
sented to the Court within the time allowed by law  
and the rules of Court is now signed, settled and  
allowed as correct, and the same is hereby ordered  
to be filed by the clerk of this Court as a part of the  
records in this cause.

Dated: October 19th, 1921.

WM. C. VAN FLEET,

Judge.

[Endorsed]: Filed Oct. 20, 1921. W. B. Maling,  
Clerk. By J. A. Schaertzer, Deputy Clerk. [42]



(Title of Court and Cause.)

**Petition for Writ of Error.**

The above-named plaintiff, Sterling Tire Corporation, feeling itself aggrieved by the judgment of the above-entitled court entered against it in this cause, comes now by its attorneys and petitions this Court for an order allowing it to prosecute a writ of error to the United States Circuit Court of Appeals for the Ninth Circuit, under and in accordance with the laws of the United States in that behalf made and provided, and that an order be made fixing the amount of security which plaintiff shall give upon said writ of error.

WHEREFORE plaintiff prays that said writ of error be granted and the amount of said security be fixed.

McNAIR & STOKER,  
Attorneys for Plaintiff.

Receipt of a copy of the within petition for writ of error hereby acknowledged this 20th day of October, 1921.

EDGAR D. PEIXOTTO,  
Attorney for Defendant.  
ROY A. BRONSON,  
Attorney for Intervenor.

[Endorsed]: Filed Oct. 20, 1921. W. B. Maling,  
Clerk. By J. A. Schaertzer, Deputy Clerk. [43]

(Title of Court and Cause.)

**Assignment of Errors.**

Comes now the plaintiff above named, Sterling Tire Corporation, and files the following assignment of errors upon which it will rely on the prosecution of its writ of error in the above-entitled cause.

**I.**

That the said Court, in rendering judgment in favor of plaintiff and against defendant for the return of the property replevined, or its value, erred in adjudging that the return of said property, or its value, should be subject to the demand established by the State Court against said property in favor of said defendant.

**II.**

That the said Court, in rendering judgment in favor of plaintiff and against defendant for the return of the property replevined, or its value, erred in refusing to adjudge that said property, or its value, should be returned to plaintiff free of any charge against it in favor of said defendant.

**III.**

That the said Court, in rendering judgment in favor of plaintiff and against defendant for the return of the property replevined, or its value, erred in refusing to adjudge that plaintiff was entitled to damages against defendant for the detention of said property from May 10, 1920, to June 16, 1920, equivalent to legal interest for that period

of time on the agreed value, to wit, \$100,000, of said property.

#### IV.

That the said Court, in rendering judgment in favor of plaintiff and against defendant for the return of the property [44] replevined, or its value, erred in adjudging that plaintiff was not entitled to damages against defendant for the detention of said property from May 10, 1920, to June 16, 1920, equivalent to legal interest for that period of time on the agreed value, to wit, \$100,000 of said property.

WHEREFORE, said plaintiff, plaintiff in error, prays that said judgment of the said Court be reversed, and that said Court be directed to render judgment in favor of plaintiff and against defendant for the return of the property replevined, or its value, free of any charge against said property on behalf of said defendant, and for damages for the detention of said property from May 10, 1920, to June 16, 1920, equivalent to legal interest for that period of time on the agreed value of said property, to wit, \$100,000.

McNAIR & STOKER,

Attorneys for Plaintiff.

Receipt of a copy of the within assignment of errors hereby acknowledged this 20th day of October, 1921.

EDGAR D. PEIXOTTO,

Attorney for Defendant.

ROY A. BRONSON,

Attorney for Intervenor.

[Endorsed]: Filed Oct. 20, 1921. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [45]

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(Title of Court and Cause.)

**Order Allowing Writ of Error.**

The plaintiff above named, having filed its petition for a writ of error, together with an assignment of errors, and praying that an order be made fixing the amount of security which plaintiff shall furnish on said writ of error:

It is ORDERED that a writ of error be, and hereby is, allowed to have reviewed in the United States Circuit Court of Appeals for the Ninth Circuit the judgment heretofore entered herein; and that the amount of bond on said writ of error be, and hereby is, fixed at \$500.00.

Dated: October 20th, 1921.

WM. C. VAN FLEET,  
Judge.

[Endorsed]: Filed Oct. 20, 1921. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [46]

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(Title of Court and Cause.)

**Bond on Writ of Error.**

KNOW ALL MEN BY THESE PRESENTS, That we, Sterling Tire Corporation, as principal, and Fidelity & Deposit Company of Maryland, a Corporation, as surety, are held and firmly bound

unto John M. Sullivan, as Receiver of an alleged copartnership consisting of E. E. Gerlinger and G. R. Hickok and trading under the fictitious name of Sterling Tire Company of California, and E. E. Gerlinger, in the sum of Five Hundred (\$500) Dollars, to be paid to the said John M. Sullivan, as such Receiver, and the said E. E. Gerlinger, their executors, administrators or assigns, to which payment, well and truly to be made, we bind ourselves, our successors, representatives and assigns, jointly and severally, by these presents.

Sealed with our seals and dated this 20th day of October, 1921.

WHEREAS, lately at a District Court of the United States for the Northern District of California in a suit depending in said Court, between Sterling Tire Corporation, plaintiff, and John M. Sullivan, as Receiver of an alleged copartnership consisting of E. E. Gerlinger and G. R. Hickok and trading under the fictitious name of Sterling Tire Company of California, defendant, and E. E. Gerlinger, intervenor, a judgment was rendered against the said Sterling Tire Corporation, and the said Sterling Tire Corporation having obtained from said Court a writ of error to reverse the judgment in the aforesaid suit, and a citation directed to the said John M. Sullivan, as Receiver of an alleged copartnership consisting of E. E. Gerlinger and G. R. Hickok [47] and trading under the fictitious name of Sterling Tire Company of California, and the said E. E. Gerlinger citing and admonishing them to be and appear at a

United States Circuit Court of Appeals for the Ninth Circuit, to be holden at San Francisco, in the State of California, within thirty days from the date of said citation:

Now, the condition of the above obligation is such, that if the said Sterling Tire Corporation shall prosecute its said writ of error to effect and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

STERLING TIRE CORPORATION.

FIDELITY AND DEPOSIT CO. OF MD.

(Seal)

By H. J. CRIDER,  
Attorney-in-fact.

M. F. CARLETON,  
Agent.

The premium charged for this bond is Ten Dollars per annum.

The above bond approved.

WM. C. VAN FLEET,  
Judge.

[Endorsed]: Filed Oct. 20, 1921. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [48]

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(Title of Court and Cause.)

**Praeipice for Record on Writ of Error.**

To the Clerk of Said Court:

Sir: Please prepare transcript of record upon writ of error in the above-entitled cause, and include the following:



1. Complaint.
2. Affidavit of replevin, instructions attached thereto, and return of marshal thereon.
3. Replevin bond in the sum of \$200,000.
4. Answer to complaint.
5. Order allowing intervention dated September 10, 1920.
6. Complaint in intervention.
7. Plaintiff's answer to complaint in intervention.
8. Stipulation waiving jury.
9. Bill of exceptions, with stipulation thereto, and order settling same.
10. Judgment.
11. Petition for writ of error.
12. Assignment of errors.
13. Order allowing writ of error.
14. Bond on writ of error.
15. Writ of error.
16. Citation.

McNAIR & STOKER,  
Attorneys for Plaintiff.

[Endorsed]: Filed Oct. 20, 1921. W. B. Maling,  
Clerk. By J. A. Schaertzer, Deputy Clerk. [49]

In the Southern Division of the United States  
District Court, in and for the Northern District  
of California, Second Division.

No. 16,392.

STERLING TIRE CORPORATION,

Plaintiff,

vs.

JOHN M. SULLIVAN, as Receiver, etc.,

Defendant.

**Certificate of Clerk U. S. District Court to Trans-  
script of Record on Writ of Error.**

I, Walter B. Maling, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify the foregoing forty-nine (49) pages, numbered from 1 to 49, inclusive, to be full, true and correct copies of the record and proceedings as enumerated in the praecipe for record on writ of error, as the same remain on file and of record in the above-entitled cause, in the office of the clerk of said court, and that the same constitute the return to the annexed writ of error.

I further certify that the cost of the foregoing return to writ of error is \$23.60; that said amount was paid by the plaintiff, and that the original writ of error and citation issued in said cause are hereto annexed.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court this 31st day of October, A. D. 1921.

[Seal]                      WALTER B. MALING,  
Clerk United States District Court in and for the  
Northern District of California. [50]

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**Writ of Error.**

UNITED STATES OF AMERICA,—ss.

The President of the United States of America, to the Honorable, the Judges of the District Court of the United States for the Northern District of California, GREETING:

BECAUSE, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you, or some of you, between Sterling Tire Corporation, plaintiff in error, and John M. Sullivan, as Receiver of an alleged co-partnership consisting of E. E. Gerlinger and G. R. Hickok and trading under the fictitious name of Sterling Tire Company of California, defendant in error, and E. E. Gerlinger, intervenor, defendant in error, a manifest error hath happened, to the great damage of the said Sterling Tire Corporation, plaintiff in error, as by its complaint appears:

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send

the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the City of San Francisco, in the State of California, within thirty days from the date hereof, in the said Circuit Court of Appeals, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

WITNESS, the Honorable WILLIAM H. TAFT, Chief Justice of the United States, the 20th day of October, in the year of our Lord one thousand nine hundred and twenty-one.

[Seal]

WALTER B. MALING,  
Clerk of the United States District Court, Northern  
District of California.

By J. A. Schaertzer,  
Deputy Clerk.

Allowed by

WM. C. VAN FLEET,  
U. S. Dist. Judge. [51]

Receipt of a copy of the within writ of error hereby  
acknowledged this 20th day of October, 1921.

EDGAR D. PEIXOTTO,  
Attorney for Defendant in Error.

ROY A. BRONSON,  
Attorney for Intervenor.

[Endorsed]: No. 16,392. United States District Court for the Northern District of California. Sterling Tire Corporation, Plaintiff in Error, vs. John M. Sullivan, etc., Defendant in Error. Writ of Error. Filed Oct. 20, 1921. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.

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**Return to Writ of Error.**

The answer of the Judge of the District Court of the United States, in and for the Northern District of California, Second Division.

The record and all proceedings of the plaint whereof mention is within made, with all things touching the same, we certify under the seal of our said Court, to the United States Circuit Court of Appeals for the Ninth Circuit, within mentioned, at the day and place within contained, in a certain schedule to this writ annexed as within we are commanded.

By the Court.

[Seal]

WALTER B. MALING,  
Clerk United States District Court for the Northern  
District of California. [52]

In the Southern Division of the District Court of the United States, in and for the Northern District of California, Second Division.

No. 16,392.

STERLING TIRE CORPORATION,

Plaintiff in Error,

vs.

JOHN M. SULLIVAN, as Receiver of an Alleged Copartnership Consisting of E. E. GERLINGER and G. R. HICKOK and Trading Under the Fictitious Name of STERLING TIRE COMPANY OF CALIFORNIA,

Defendant in Error.

E. E. GERLINGER, Intervenor.

**Citation on Writ of Error.**

The President of the United States to John M. Sullivan, as Receiver of an Alleged Copartnership Consisting of E. E. Gerlinger and G. R. Hickok and Trading Under the Fictitious Name of Sterling Tire Company of California, and to Edgar D. Peixiotto, Your Attorney, and to E. E. Gerlinger and to Roy A. Bronson, Your Attorney:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be held in the City of San Francisco, California, within thirty days from the date hereof, pursuant to a writ of error filed in the office of the clerk of the above-entitled court, wherein



the Sterling Tire Corporation is plaintiff in error and you, and each of you, are defendants in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable WM. C. VAN FLEET, District Judge of the United States District Court, in and for the Southern Division of the Northern District of California, this 20th day of October, 1921.

WM. C. VAN FLEET,  
Judge. [53]

Receipt of a copy of the within citation hereby acknowledged this 20th day of October, 1921.

EDGAR D. PEIXOTTO,  
Attorney for Defendant.

ROY A. BRONSON,  
Attorney for Intervenor.

[Endorsed]: No. 16,392. Southern Division, District Court of the U. S., Northern District of Cal., Second Division. Sterling Tire Corporation, Plaintiff, vs. John M. Sullivan, as Receiver, etc., Defendant. E. E. Gerlinger, Intervenor. Citation. Filed Oct. 20, 1921. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.

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[Endorsed]: No. 3794. United States Circuit Court of Appeals for the Ninth Circuit. Sterling Tire Corporation, a Corporation, Plaintiff in Error, vs. John M. Sullivan, as Receiver of an Alleged

Copartnership Consisting of E. E. Gerlinger and G. R. Hickok and Trading Under the Fictitious Name of Sterling Tire Company of California, and E. E. Gerlinger, Intervenor, Defendants in Error. Transcript of Record. Upon Writ of Error to the Southern Division of the United States District Court of the Northern District of California, Second Division.

Filed October 31, 1921.

F. D. MONCKTON,  
Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit.

By Paul P. O'Brien,  
Deputy Clerk.